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HSBC MORTGAGE CORPORATION (USA) and  
HSBC BANK USA, N.A.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

Philip Wong, Frederic Chaussy, and Leslie Marie Shearn, individually, on behalf of all others similarly situated, and on behalf of the general public,

### **Plaintiffs.**

V.

HSBC Mortgage Corporation (USA);  
HSBC Bank USA, N.A.; and DOES 1  
through 50, inclusive,

### Defendants.

Case No. C 07 2446 MMC [ECF]

**HSBC BANK USA, N.A.'S ANSWER TO  
PLAINTIFFS' SECOND AMENDED  
COMPLAINT**

COMES NOW Defendant HSBC Bank USA, N.A. (“HSBC Bank”), and for its Answer to the Second Amended Complaint for Damages, Restitution and Injunctive Relief (“Complaint”) filed by Plaintiffs Philip Wong, Frederic Chaussy, Leslie Marie Shearn and Chad Barbiere, hereinafter collectively referred to as “Plaintiffs,” on behalf of themselves, the general public, and all others similarly situated, admits, denies, and alleges as follows:

## **PRELIMINARY STATEMENT**

1. Answering Paragraph 1 of the Complaint, generally no answer is required to Paragraph 1, which merely defines the nature of the action, on whose behalf Plaintiffs' claims are asserted, and against whom Plaintiffs' claims are asserted. HSBC Bank denies that Plaintiffs and putative class members were or are employed by HSBC Bank USA, N.A., denies the implication that it engaged in any violations alleged in Paragraph 1, and denies the implication that Plaintiffs or putative class members were erroneously denied anything referenced in Paragraph 1. Answering Paragraph 1 of the Complaint, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 1.

2. Answering Paragraph 2 of the Complaint, generally no answer is required to Paragraph 2, which merely defines on whose behalf Plaintiffs seek to assert claims and information regarding the alleged statutes of limitation. HSBC Bank denies that Plaintiffs and putative class members were or are employed by HSBC Bank USA, N.A., and denies the implication that it engaged in any violations alleged in Paragraph 2, as well as the implication that Plaintiffs or putative class members were erroneously denied anything referenced in Paragraph 2. Answering Paragraph 2 of the Complaint, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 2.

3. Answering Paragraph 3 of the Complaint, generally no answer is required to Paragraph 3, which merely defines on whose behalf Plaintiffs seek to assert the California claims and information regarding the alleged statutes of limitation. HSBC Bank denies that Plaintiffs and putative class members were or are employed by HSBC Bank USA, N.A., and denies the implication that it engaged in any violations alleged in Paragraph 3, as well as the implication that Plaintiffs or putative class members were erroneously denied anything referenced in Paragraph 3. Answering

Paragraph 3 of the Complaint, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 3.

4. Answering Paragraph 4 of the Complaint, generally no answer is required to Paragraph 4, which merely defines on whose behalf Plaintiffs seek to assert the New York claims and information regarding the alleged statutes of limitation. HSBC Bank denies that Plaintiffs and putative class members are or were employed by HSBC Bank USA, N.A., and denies the implication that it engaged in any violations alleged in Paragraph 4, as well as the implication that Plaintiffs or putative class members were erroneously denied anything referenced in Paragraph 4. Answering Paragraph 4 of the Complaint, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 4.

5. Answering Paragraph 5 of the Complaint, generally no answer is required to Paragraph 5, which merely defines on whose behalf Plaintiffs' New Jersey claims are asserted and information regarding the statutes of limitation. HSBC Bank denies that Plaintiffs and putative class members are or were employed by HSBC Bank USA, N.A., and denies the implication that it engaged in any violations alleged in Paragraph 5, as well as the implication that Plaintiffs or putative class members were erroneously denied anything referenced in Paragraph 5. Answering Paragraph 5 of the Complaint, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 5.

6. Answering Paragraph 6 of the Complaint, generally no answer is required to Paragraph 6, which merely sets forth the types of relief sought by Plaintiffs. HSBC Bank denies the implication that it engaged in any violations alleged in Paragraph 6, as well as the implication that Plaintiffs or putative class members are entitled to any relief referenced in Paragraph 6. HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 6.

## THE PARTIES

7. Answering Paragraph 7 of the Complaint, HSBC Bank admits only that Wong was employed by HSBC Mortgage Corporation (USA) (“HSBC Mortgage”) from December 5, 2005 to November 20, 2006 as a Senior Retail Mortgage Lending Consultant and from November 20, 2006 to approximately March 13, 2008 as a Retail Mortgage Lending Consultant. HSBC Bank denies that

1 Wong has ever been employed by HSBC Bank USA, N.A. HSBC Bank lacks sufficient information  
 2 or belief to respond to the remaining allegations in Paragraph 7, and on that basis, denies, generally  
 3 and specifically, each and every other allegation in Paragraph 7.

4       8. Answering Paragraph 8 of the Complaint, HSBC Bank admits only that Chaussy was  
 5 employed by HSBC Mortgage from approximately April 2006 to November 20, 2006 as a Senior  
 6 Retail Mortgage Lending Consultant and from November 20, 2006 until his employment was  
 7 terminated on approximately April 19, 2007 as a Retail Mortgage Lending Consultant. HSBC Bank  
 8 denies that Chaussy is or ever was employed by HSBC Bank USA, N.A. HSBC Bank lacks  
 9 sufficient information or belief to respond to the remaining allegations in Paragraph 8, and on that  
 10 basis, denies, generally and specifically, each and every other allegation in Paragraph 8.

11      9. Answering Paragraph 9 of the Complaint, HSBC Bank admits only that Shearn was  
 12 employed by HSBC Mortgage from approximately February 11, 2002 until August 18, 2003 as a  
 13 Loan Production Office Assistant and from approximately August 18, 2003 until January 3, 2005 as  
 14 a Senior Loan Production Office Assistant and from approximately January 3, 2005 to October 13,  
 15 2006 as a Senior Retail Mortgage Lending Consultant. HSBC Bank denies that Shearn is or ever  
 16 was employed by HSBC Bank USA, N.A. HSBC Bank lacks sufficient information or belief to  
 17 respond to the remaining allegations in Paragraph 9, and on that basis, denies, generally and  
 18 specifically, each and every other allegation in Paragraph 9.

19      10. Answering Paragraph 10 of the Complaint, HSBC Bank admits only that Barbiere  
 20 was employed by HSBC Mortgage from April 3, 2006 to November 20, 2006 as a Senior Retail  
 21 Mortgage Lending Consultant and from November 20, 2006 to February 22, 2007 as a Retail  
 22 Mortgage Lending Consultant. HSBC Bank denies that Barbiere is or ever was employed by HSBC  
 23 Bank USA, N.A. HSBC Bank lacks sufficient information or belief to respond to the remaining  
 24 allegations in Paragraph 10, and on that basis, denies, generally and specifically, each and every  
 25 other allegation in Paragraph 10.

26      11. Answering Paragraph 11 of the Complaint, HSBC Bank admits only that HSBC  
 27 Mortgage does business in several states and cities throughout the United States and that it maintains  
 28 places of business in several states throughout the United States. HSBC Bank lacks sufficient

information or belief to respond to the remaining allegations in Paragraph 11, and on that basis, denies, generally and specifically, each and every other allegation in Paragraph 11.

12. Answering Paragraph 12 of the Complaint, HSBC Bank denies that HSBC Bank USA, N.A. is a proper defendant in this matter. HSBC Bank admits the remaining allegations in Paragraph 12, except with regard to Redwood City, California. HSBC Bank denies generally and specifically, each and every other allegation in Paragraph 12.

13. Answering Paragraph 13, HSBC Bank alleges that Doe defendant pleading is not allowed in Federal Court. HSBC Bank lacks information sufficient to form a belief as to the truth of the allegations in paragraph 13 of the Complaint, as they relate to Defendants not yet named, and therefore denies, generally and specifically, each and every allegation.

14. Answering Paragraph 14 of the Complaint, Paragraph 14 contains legal argument not requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 14.

## **JURISDICTION AND VENUE**

15. Answering Paragraph 15 of the Complaint, HSBC Bank lacks information sufficient to form a belief as to the truth of the allegation that each representative Plaintiff signed the necessary consent form to join this lawsuit, and therefore denies this allegation. HSBC Bank denies that there is supplemental or pendent jurisdiction over the Plaintiffs' state law claims as the federal claims are without merit.

16. Answering Paragraph 16 of the Complaint, HSBC Bank lacks information sufficient to form a belief as to the truth of the allegation that a substantial part of the events giving rise to the claims occurred in this district, and therefore denies this allegation. HSBC Bank admits that it operates facilities in San Francisco, San Mateo, Palo Alto, Milpitas, Cupertino, Oakland and Fremont, California. HSBC Bank lacks sufficient information or belief to respond to the remaining allegations in Paragraph 16 with regard to HSBC Mortgage, and on that basis, denies, generally and specifically, each and every other allegation in Paragraph 16.

17. Answering Paragraph 17 of the Complaint, HSBC Bank lacks information sufficient to form a belief as to the truth of the allegation that a substantial part of the events giving rise to this

1 dispute occurred in San Francisco, San Mateo, Santa Clara, and Alameda Counties, California and,  
 2 on that basis, denies the allegations in Paragraph 17.

### 3 COLLECTIVE ACTION ALLEGATIONS

4 18. Answering Paragraph 18 of the Complaint, generally no answer is required to  
 5 Paragraph 18, which merely defines the nature of the action, the alleged collective class and on  
 6 whose behalf Plaintiffs' claims are asserted. HSBC Bank admits that Plaintiffs have alleged that  
 7 they bring this action under 29 U.S.C. § 216(b) and that Plaintiffs have alleged they seek to represent  
 8 the classes of persons described in Paragraph 18, and that the job titles listed in Paragraph 18 are job  
 9 titles used by HSBC Mortgage, but states that those allegations are ultimate conclusions of law  
 10 reserved exclusively for the trier of fact. Moreover, HSBC Bank denies that such positions are  
 11 appropriately included in any proposed class(es). HSBC Bank denies the implication that it engaged  
 12 in any violations alleged in Paragraph 18 and denies the implication that Plaintiffs or putative class  
 13 members were erroneously denied anything referenced in Paragraph 18. Answering Paragraph 18 of  
 14 the Complaint, HSBC Bank denies, generally and specifically, each and every other allegation in  
 15 Paragraph 18.

16 19. Answering Paragraph 19 of the Complaint, HSBC Bank denies the implication that  
 17 Plaintiffs or putative class members were erroneously denied anything referenced in Paragraph 19  
 18 and, on that basis, denies, generally and specifically, all allegations in Paragraph 19.

19 20. Answering Paragraph 20 of the Complaint, Paragraph 20 contains legal argument not  
 20 requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and  
 21 specifically, each and every allegation in Paragraph 20.

22 21. Answering Paragraph 21 of the Complaint, Paragraph 21 contains legal argument not  
 23 requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and  
 24 specifically, each and every allegation in Paragraph 21.

25 22. Answering Paragraph 22 of the Complaint, Paragraph 22 contains legal argument not  
 26 requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and  
 27 specifically, each and every allegation in Paragraph 22.

28

1       23. Answering Paragraph 23 of the Complaint, Paragraph 23 contains legal argument not  
2 requiring an answer. HSBC Bank denies the implications that there are numerous similarly situated  
3 current and former employees who would benefit from the issuance of a court supervised notice of  
4 the present lawsuit and the opportunity to join in the present lawsuit. To the extent an answer is  
5 required, HSBC Bank denies, generally and specifically, each and every other allegation in  
6 Paragraph 23.

## **CLASS ACTION ALLEGATIONS**

8       24. Answering Paragraph 24 of the Complaint, generally no answer is required to  
9 Paragraph 24, which merely defines the nature of the action, the alleged classes and on whose behalf  
10 Plaintiffs seek to assert claims. HSBC Bank admits that Plaintiffs bring this action pursuant to Rule  
11 23 of the Federal Rules of Civil Procedure and that Plaintiffs seek to represent the classes of persons  
12 described in Paragraph 24. HSBC Bank denies the implication that it engaged in any violations  
13 alleged in Paragraph 24 and denies the implication that Plaintiffs or putative class members were  
14 erroneously denied anything referenced in Paragraph 24. Answering Paragraph 24 of the Complaint,  
15 HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 24.

16        25. Answering Paragraph 25 of the Complaint, Paragraph 25 contains legal argument not  
17 requiring an answer. HSBC Bank denies the implication that the proposed classes are so numerous  
18 as to make the case suitable for class treatment. To the extent an answer is required, HSBC Bank  
19 denies, generally and specifically, each and every allegation in Paragraph 25.

20        26. Answering Paragraph 26 of the Complaint, Paragraph 26 contains legal argument not  
21 requiring an answer. HSBC Bank denies the implication that Plaintiffs' claims are typical of the  
22 proposed class' claims so as to make the case suitable for class treatment. To the extent an answer is  
23 required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 26.

24       27. Answering Paragraph 27 of the Complaint, Paragraph 27 contains legal argument not  
25 requiring an answer. HSBC Bank denies the implication that a class action is the superior method to  
26 resolve Plaintiffs' or the proposed class' claims. To the extent an answer is required, HSBC Bank  
27 denies, generally and specifically, each and every allegation in Paragraph 27.

1           28. Answering Paragraph 28 of the Complaint, Paragraph 28 contains legal argument not  
 2 requiring an answer. HSBC Bank denies the implication that Plaintiffs are adequate representatives  
 3 so as to make the case suitable for class treatment. Moreover, HSBC Bank denies that the legal  
 4 counsel retained by Plaintiffs in this matter will adequately represent the proposed class(es). To the  
 5 extent an answer is required, HSBC Bank denies, generally and specifically, each and every  
 6 allegation in Paragraph 28.

7           29. Answering Paragraph 29 and subparagraphs A through J of the Complaint,  
 8 Paragraph 29 and subparagraphs A through J contain legal argument not requiring an answer. HSBC  
 9 Bank denies the implication that common questions of law and fact exist so as to make the case  
 10 suitable for class treatment. To the extent an answer is required, HSBC Bank denies, generally and  
 11 specifically, each and every allegation in Paragraph 29 and subparagraphs A through J.

12          30. Answering Paragraph 30 of the Complaint, Paragraph 30 contains legal argument not  
 13 requiring an answer. HSBC Bank denies the implication that prosecutions of actions by or against  
 14 individuals would result in inconsistent or varying adjudications so as to make the case suitable for  
 15 class treatment. To the extent an answer is required, HSBC Bank denies, generally and specifically,  
 16 each and every allegation in Paragraph 30.

17          31. Answering Paragraph 31 of the Complaint, Paragraph 31 contains legal argument not  
 18 requiring an answer. HSBC Bank denies the implication that this case is suitable for class treatment.  
 19 To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every  
 20 allegation in Paragraph 31.

21          32. Answering Paragraph 32 of the Complaint, HSBC Bank lacks information sufficient  
 22 to form a belief as to the truth of the allegation that Plaintiffs intend to send notice to all members of  
 23 the proposed class to the extent required by Rule 23 or that the names and addresses of the proposed  
 24 class are available from HSBC Bank, as the allegation is related to proposed class members not yet  
 25 named. On these bases, HSBC Bank denies the allegations in Paragraph 32.

## **FIRST CLAIM FOR RELIEF**

## **(Failure to Pay Overtime Compensation in Violation of the Fair Labor Standards Act)**

33. Answering Paragraph 33 of the Complaint, HSBC Bank incorporates by reference its answers to Paragraphs 1 through 32 of the Complaint.

34. Answering Paragraph 34 of the Complaint, HSBC Bank lacks information sufficient to form a belief as to the truth of the allegation that Plaintiffs signed the necessary consent forms to join this lawsuit or that Plaintiffs anticipate other consent forms will be signed, and therefore denies these allegations.

35. Answering Paragraph 35 of the Complaint, HSBC Bank admits that 20 U.S.C. § 203 covers certain employers, that HSBC Mortgage formerly employed Wong, Chaussy, Shearn and Barbiere, that HSBC Mortgage employs other individuals who performed or perform job duties similar to or the same as Wong and/or Chaussy and/or Shearn and/or Barbiere, and that HSBC Mortgage and HSBC Bank had gross operating revenue in excess of \$500,000.00. HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 35.

36. Answering Paragraph 36 of the Complaint, HSBC Bank admits that non-exempt employees are entitled to pay at a rate of one and one-half times their regular rate of pay for work performed in excess of forty hours per work week under the FLSA. HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 36.

37. Answering Paragraph 37 of the Complaint, Paragraph 37 contains legal argument not requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 37.

38. Answering Paragraph 38 of the Complaint, Paragraph 38 contains legal argument not requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 38.

39. Answering Paragraph 39 of the Complaint, Paragraph 39 contains legal argument not requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 39.

40. Answering Paragraph 40 of the Complaint, generally no answer is required to Paragraph 40, which merely sets forth the types of relief sought by Plaintiffs. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 40.

41. Answering Paragraph 41 of the Complaint, generally no answer is required to Paragraph 41, which merely sets forth the types of relief sought by Plaintiffs. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 41.

## **SECOND CLAIM FOR RELIEF**

### **(Failure to Pay Overtime Compensation in Violation of California Law)**

42. Answering Paragraph 42 of the Complaint, HSBC Bank incorporates by reference its answers to Paragraphs 1 through 41 of the Complaint.

43. Answering Paragraph 43 of the Complaint, Paragraph 43 contains legal argument not requiring an answer. To the extent an answer is required, HSBC Bank admits that California Labor Code § 510 requires employers to pay overtime to certain employees under certain circumstances and that California Labor Code § 1198 makes it unlawful to employ certain persons for hours longer than certain hours set by the Industrial Welfare Commission or under certain conditions prohibited under certain wage orders of the Industrial Welfare Commission. HSBC Bank denies any implication that HSBC Bank was an employer of Plaintiffs or putative class members at any time. HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 43.

44. Answering Paragraph 44 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 44.

45. Answering Paragraph 45 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 45.

### **THIRD CLAIM FOR RELIEF**

### (Waiting Time Penalties)

46. Answering Paragraph 46 of the Complaint, HSBC Bank incorporates by reference its answers to Paragraphs 1 through 45 of the Complaint.

47. Answering Paragraph 47 of the Complaint, HSBC Bank admits that certain individuals who performed services for HSBC Mortgage, including all named Plaintiffs, are no longer employed by HSBC Mortgage. Except as expressly admitted herein, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 47.

48. Answering Paragraph 48 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 48.

## **FOURTH CLAIM FOR RELIEF**

### **(Failure to Provide Accurate Itemized Wage Statements)**

49. Answering Paragraph 49 of the Complaint, HSBC Bank incorporates by reference its answers to Paragraphs 1 through 48 of the Complaint.

50. Answering Paragraph 50 of the Complaint, Paragraph 50 contains legal arguments not requiring an answer. To the extent an answer is required, HSBC Bank admits that California Labor Code § 226(a) requires that California employers provide itemized wage statements and that California Labor Code § 226(e) provides certain remedies for some violations of California Labor Code § 226(a). HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 50.

51. Answering Paragraph 51 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 51.

## **FIFTH CLAIM FOR RELIEF**

#### **(Failure to Provide Rest Breaks and Meal Periods)**

52. Answering Paragraph 52 of the Complaint, HSBC Bank incorporates by reference its answers to Paragraphs 1 through 51 of the Complaint.

53. Answering Paragraph 53 of the Complaint, Paragraph 53 contains legal arguments not requiring an answer. To the extent an answer is required, HSBC Bank admits that California Labor

Code § 512 prohibits an employer from employing certain employees for a work period of more than five hours per day without providing that employee with a meal period of not less than 30 minutes, or for a work period of more than 10 hours per day without providing that employee with a second meal period of not less than 30 minutes, all of which the employee may waive or simply choose not to take. HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 53.

7       54. Answering Paragraph 54 of the Complaint, Paragraph 54 contains legal arguments not  
8 requiring an answer. To the extent an answer is required, HSBC Bank admits that Section 11 of  
9 Wage Order No. 4 includes language related to meal period requirements under California law.  
10 HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 54.

11       55. Answering Paragraph 55 of the Complaint, Paragraph 55 contains legal arguments not  
12 requiring an answer. To the extent an answer is required, HSBC Bank admits that Section 12 of  
13 Wage Order No. 4 includes language related to rest period requirements under California law.  
14 HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 55.

15       56. Answering Paragraph 56 of the Complaint, Paragraph 56 contains legal arguments not  
16 requiring an answer. To the extent an answer is required, HSBC Bank admits that California Labor  
17 Code § 226.7 prohibits certain employees from being denied meal and rest periods as mandated  
18 under California law and requires premium pay in the amount of one hour's wages for violations of  
19 the meal and rest period provisions of the California Industrial Welfare Commission wage orders.  
20 Except as expressly admitted herein, HSBC Bank denies, generally and specifically, each and every  
21 other allegation in Paragraph 56.

22       57. Answering Paragraph 57 of the Complaint, HSBC Bank denies, generally and  
23 specifically, each and every allegation in Paragraph 57.

## **SIXTH CLAIM FOR RELIEF**

## **(Unfair Practice under the Unfair Competition Act)**

26        58. Answering Paragraph 58 of the Complaint, HSBC Bank incorporates by reference its  
27 answers to Paragraphs 1 through 57 of the Complaint.

59. Answering Paragraph 59 of the Complaint, Paragraph 59 contains legal arguments not requiring an answer. To the extent an answer is required, HSBC Bank admits that California Business and Professions Code § 17200 prohibits certain types of competition by prohibiting unlawful or unfair business acts and practices. HSBC Bank denies the implication that it engaged in any unlawful or unfair business practices. Except as expressly admitted herein, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 59.

60. Answering Paragraph 60 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 60.

## **SEVENTH CLAIM FOR RELIEF**

**(Violation of New Jersey Wage and Hour Law, N.J.S.A. § 34:11 *et seq.*, and  
N.J.A.C. § 12:56 *et seq.* – On Behalf of the New Jersey Named Plaintiff and New Jersey Class)**

61. Answering Paragraph 61 of the Complaint, HSBC Bank incorporates by reference its answers to Paragraphs 1 through 60 of the Complaint.

62. Answering Paragraph 62 of the Complaint, Paragraph 62 contains legal arguments not requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 62.

63. Answering Paragraph 63 of the Complaint, Paragraph 63 contains legal arguments not requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 63.

64. Answering Paragraph 64 of the Complaint, Paragraph 64 contains legal arguments not requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 64.

65. Answering Paragraph 65 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 66.

66. Answering Paragraph 66 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 66.

## **EIGHTH CLAIM FOR RELIEF**

### **(Failure to Pay Overtime Compensation in Violation of New York Law)**

67. Answering Paragraph 67 of the Complaint, HSBC Bank incorporates by reference its answers to Paragraphs 1 through 66 of the Complaint.

68. Answering Paragraph 68 of the Complaint, Paragraph 68 contains legal arguments not requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 68. HSBC Bank further specifically denies that it ever employed Shearn or any putative member of the proposed New York class and denies that it is a proper party to this claim.

69. Answering Paragraph 69 of the Complaint, Paragraph 69 contains legal arguments not requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 69.

70. Answering Paragraph 70 of the Complaint, Paragraph 70 contains legal argument not requiring an answer. To the extent an answer is required, HSBC Bank admits New York law requires payment of overtime compensation to non-exempt employees, and requires that an employer pay non-exempt employees for all hours worked at an agreed upon rate of pay. HSBC Bank denies that it ever employed Shearn or any putative class member. Except as expressly admitted herein, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 70.

71. Answering Paragraph 71 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 71.

72. Answering Paragraph 72 of the Complaint, Paragraph 72 contains legal arguments not requiring an answer. To the extent an answer is required, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 72.

73. Answering Paragraph 73 of the Complaint, generally no answer is required to Paragraph 73, which merely sets forth the types of relief sought by Plaintiffs. HSBC Bank denies the implication that it engaged in any violations alleged in Paragraph 73, as well as the implication

that Plaintiffs or putative class members are entitled to the relief referenced in Paragraph 73. HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 73.

74. Answering Paragraph 74 of the Complaint, generally no answer is required to Paragraph 74, which merely sets forth a type of relief sought by Plaintiffs. HSBC Bank denies the implication that it engaged in any violations alleged in Paragraph 74, as well as the implication that Plaintiffs or putative class members are entitled to the relief referenced in Paragraph 74. HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 74.

## **NINTH CLAIM FOR RELIEF**

## **(Unlawful Deductions from Wages in California, under California Labor Code)**

## **§§ 221 and 224 and IWC Wage Order 4 )**

75. Answering Paragraph 75 of the Complaint, HSBC Bank incorporates by reference its answers to Paragraphs 1 through 74 of the Complaint.

76. Answering Paragraph 76 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 76.

77. Answering Paragraph 77 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 77.

78. Answering Paragraph 78 of the Complaint, Paragraph 78 contains legal argument not requiring an answer. To the extent an answer is required, HSBC Bank admits that California Labor Code § 221 provides that “it shall be unlawful for any employer to collect or to receive from an employee any part of the wages theretofore paid by said employer to said employee” and admits that California Labor Code § 224 allows deductions from wages when required or empowered by law or when authorized by the employee in writing. Except as expressly admitted herein, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 78.

79. Answering Paragraph 79 of the Complaint, Paragraph 79 contains legal argument not requiring an answer. To the extent an answer is required, HSBC Bank admits that *DLSE Policies & Interpretations Manual*, § 11.3, states that deductions from wages are permitted for “items which are for the direct benefit of the employee – not deductions which in any way benefit the employer either

1 directly or indirectly." Except as expressly admitted herein, HSBC Bank denies, generally and  
 2 specifically, each and every other allegation in Paragraph 79.

3       80. Answering Paragraph 80 of the Complaint, Paragraph 80 contains legal argument not  
 4 requiring an answer. To the extent an answer is required, HSBC Bank admits that IWC Wage Order  
 5, which applies only to certain employees, provides: "No employer shall make any deduction from  
 6 the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of  
 7 equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or  
 8 willful act, or by the gross negligence of the employee." Except as expressly admitted herein, HSBC  
 9 Bank denies, generally and specifically, each and every other allegation in Paragraph 80.

10     81. Answering Paragraph 81 of the Complaint, HSBC Bank denies, generally and  
 11 specifically, each and every allegation in Paragraph 81.

12     82. Answering Paragraph 82 of the Complaint, generally no answer is required to  
 13 Paragraph 82, which merely sets forth the types of relief sought by Plaintiffs. HSBC Bank denies  
 14 the implication that it engaged in any violations alleged in Paragraph 82, as well as the implication  
 15 that Plaintiffs or putative class members are entitled to the relief referenced in Paragraph 82. HSBC  
 16 Bank denies, generally and specifically, each and every other allegation in Paragraph 82.

17     83. Answering Paragraph 83 of the Complaint, generally no answer is required to  
 18 Paragraph 83, which merely sets forth the types of relief sought by Plaintiffs. HSBC Bank denies  
 19 the implication that it engaged in any violations alleged in Paragraph 83, as well as the implication  
 20 that Plaintiffs or putative class members are entitled to the relief referenced in Paragraph 83. HSBC  
 21 Bank denies, generally and specifically, each and every other allegation in Paragraph 83.

## 22                   **TENTH CLAIM FOR RELIEF**

### 23                   **(Unlawful Deductions from Wages in New York, under N.Y. Lab. Law § 193(1) and** 24                   **N.Y. Comp. Codes. R. & Regs. Title 12, § 142-1.1 *et seq.*)**

25     84. Answering Paragraph 84 of the Complaint, HSBC Bank incorporates by reference  
 26 its answers to Paragraphs 1 through 83 of the Complaint.

27     85. Answering Paragraph 85 of the Complaint, HSBC Bank denies, generally and  
 28 specifically, each and every allegation in Paragraph 85.

86. Answering Paragraph 86 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 86.

87. Answering Paragraph 87 of the Complaint, Paragraph 87 contains legal argument not requiring an answer. To the extent an answer is required, HSBC Bank admits that New York Labor Law § 193 prohibits certain deductions from being made from an employee's wages. Except as expressly admitted herein, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 87.

88. Answering Paragraph 88 of the Complaint, Paragraph 88 contains legal argument not requiring an answer. To the extent an answer is required, HSBC Bank admits that New York regulations purport to prohibit certain deductions from wages. Except as expressly admitted herein, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 88.

89. Answering Paragraph 89 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 89.

90. Answering Paragraph 90 of the Complaint, generally no answer is required to Paragraph 90, which merely sets forth the types of relief sought by Plaintiffs. HSBC Bank denies the implication that it engaged in any violations alleged in Paragraph 90, as well as the implication that Plaintiffs or putative class members are entitled to the relief referenced in Paragraph 90. HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 90.

91. Answering Paragraph 91 of the Complaint, generally no answer is required to Paragraph 91, which merely sets forth the types of relief sought by Plaintiffs. HSBC Bank denies the implication that it engaged in any violations alleged in Paragraph 91, as well as the implication that Plaintiffs or putative class members are entitled to the relief referenced in Paragraph 91. HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 91.

## **ELEVENTH CLAIM FOR RELIEF**

## **(Unlawful Deductions from Wages in New Jersey, under N.J. Stat. Ann. § 34:11-4.4)**

92. Answering Paragraph 92 of the Complaint, HSBC Bank incorporates by reference its answers to Paragraphs 1 through 91 of the Complaint.

93. Answering Paragraph 93 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 93.

94. Answering Paragraph 94 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 94.

95. Answering Paragraph 95 of the Complaint, Paragraph 95 contains legal argument not requiring an answer. To the extent an answer is required, HSBC Bank admits that New Jersey Statutes Annotated § 34:11-4.4 provides that it is unlawful for an employer to withhold or divert employees' wages under certain circumstances. Except as expressly admitted herein, HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 95.

96. Answering Paragraph 96 of the Complaint, HSBC Bank denies, generally and specifically, each and every allegation in Paragraph 96.

97. Answering Paragraph 97 of the Complaint, generally no answer is required to Paragraph 97, which merely sets forth the types of relief sought by Plaintiffs. HSBC Bank denies the implication that it engaged in any violations alleged in Paragraph 97, as well as the implication that Plaintiffs or putative class members are entitled to the relief referenced in Paragraph 97. HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 97.

98. Answering Paragraph 98 of the Complaint, generally no answer is required to Paragraph 98, which merely sets forth the types of relief sought by Plaintiffs. HSBC Bank denies the implication that it engaged in any violations alleged in Paragraph 98, as well as the implication that Plaintiffs or putative class members are entitled to the relief referenced in Paragraph 98. HSBC Bank denies, generally and specifically, each and every other allegation in Paragraph 98.

## AFFIRMATIVE DEFENSES

AS A FIRST, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank alleges that the Complaint, and each and every cause of action contained therein, fails to properly state a claim upon which relief can be granted.

AS A SECOND, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank alleges that it has no liability for wages, penalties, interest, or other compensation or amounts that may be due Plaintiffs because HSBC Bank was not Plaintiffs' or putative plaintiffs' or class

1 members' employer within the definition of, but not limited to, the federal Fair Labor Standards Act,  
 2 the California Labor Code, the California Industrial Welfare Commission wage orders, New Jersey  
 3 State Wage and Hour Law or New York Labor Law.

4 AS A THIRD, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank alleges  
 5 that all or portions of Plaintiffs' claims are barred by the applicable statutes of limitation.

6 AS A FOURTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 7 alleges that Plaintiffs were not entitled to payment of overtime premiums because they were  
 8 employees exempted from overtime requirements pursuant to, but not limited to, 29 U.S.C.  
 9 § 213 *et seq.* (excluding the executive, professional, administrative and retail exemptions as  
 10 specified in the Court's March 19, 2008 Order Granting In Part and Denying In Part Plaintiffs'  
 11 Motion for Conditional Certification, For Production, and For Partial Summary Judgment;  
 12 Directions to Parties; Vacating Hearing), the California Labor Code, the provisions of the California  
 13 Industrial Welfare Commission's wage orders, New Jersey State Wage and Hour Law and New  
 14 York Labor Law.

15 AS A FIFTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank alleges  
 16 that any violation of the Fair Labor Standards Act was not willful, and that all or portions of  
 17 Plaintiffs' claims alleging violation of the Fair Labor Standards Act are barred by the applicable  
 18 statutes of limitation, including, but not limited to, 29 U.S.C. § 255.

19 AS A SIXTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank alleges  
 20 that any violation of the Fair Labor Standards Act was an act or omission made in good faith and  
 21 HSBC Bank had reasonable grounds for believing that the act or omission was not a violation of the  
 22 Fair Labor Standards Act so that, pursuant to 29 U.S.C. § 260, liquidated damages cannot be  
 23 awarded.

24 AS A SEVENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 25 alleges that the amounts described in Section 7(e) of the Fair Labor Standards Act, 29 U.S.C.  
 26 § 207(e), must be excluded from the regular rate on which any overtime due is calculated under  
 27 federal, California, New York or New Jersey law.

28

1 AS AN EIGHTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 2 alleges that its business actions or practices were not “unfair” within the meaning of California  
 3 Business and Professions Code § 17200 *et seq.*

4 AS A NINTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank alleges  
 5 that its business actions or practices were not “unlawful” within the meaning of California Business  
 6 and Professions Code § 17200 *et seq.*

7 AS A TENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank alleges  
 8 that its business actions or practices were not “harmful” within the meaning of California Business  
 9 and Professions Code § 17200 *et seq.*

10 AS AN ELEVENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 11 alleges that its business actions or practices were not “fraudulent” or “deceptive” within the meaning  
 12 of California Business and Professions Code § 17200 *et seq.*

13 AS A TWELFTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 14 alleges that Plaintiffs’ claims under California Labor Code § 226.7 are barred because Plaintiffs lack  
 15 a private right of action to bring suit under that statute.

16 AS A THIRTEENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 17 alleges that the Complaint fails to properly state a claim for penalties under California Labor Code  
 18 § 203 because any failure to pay wages found to be due Plaintiffs was not willful.

19 AS A FOURTEENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 20 alleges that the Complaint fails to properly state a claim for penalties under California Labor Code  
 21 § 203 because there is a bona fide, good faith dispute with respect to HSBC Bank’s obligation to pay  
 22 any wages.

23 AS A FIFTEENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 24 alleges that Plaintiffs’ claims are barred by the doctrine of estoppel.

25 AS A SIXTEENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 26 alleges that Plaintiffs lack standing to bring their claims as to all or a portion of the claims presented  
 27 in the Complaint.

1 AS A SEVENTEENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 2 Bank alleges that all or portions of Plaintiffs' claims are barred by the doctrine of laches.

3 AS AN EIGHTEENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 4 Bank alleges that all or portions of Plaintiffs' claims are barred by the doctrine of unclean hands.

5 AS A NINETEENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 6 alleges that all or portions of Plaintiffs' claims are barred by the doctrine of avoidable consequences  
 7 because reasonable steps were taken to prevent and correct allegedly improper wage payments,  
 8 Plaintiffs unreasonably failed to use the preventative and corrective opportunities provided to them,  
 9 and the reasonable use of those procedures would have prevented at least some, if not all, of the  
 10 harm Plaintiffs allegedly suffered.

11 AS A TWENTIETH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 12 alleges that Plaintiffs and putative plaintiffs or class members were treated fairly and in good faith,  
 13 and that all actions taken with respect to Plaintiffs were taken for lawful business reasons and in  
 14 good faith.

15 AS A TWENTY-FIRST, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 16 Bank alleges that Plaintiffs and putative plaintiffs or class members were not entitled to mandatory  
 17 meal and/or rest periods under California law, nor are they entitled to recover penalties under  
 18 California law for allegedly missed meal or rest periods, because they were exempted from meal and  
 19 rest period requirements pursuant to the provisions of the California Industrial Welfare Commission  
 20 wage orders.

21 AS A TWENTY-SECOND, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 22 Bank alleges that Plaintiffs' prosecution of this action by Plaintiffs as a representative of the general  
 23 public under California Business and Professions Code § 17200 *et seq.*, as applied to the facts and  
 24 circumstances of this case, would constitute a denial of HSBC Bank's substantive and procedural  
 25 due process rights under the Fourteenth Amendment of the United States Constitution and under the  
 26 California Constitution.

27 AS A TWENTY-THIRD, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 28 Bank alleges that the Complaint fails to properly state a claim for injunctive relief.

1 AS A TWENTY-FOURTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 2 Bank alleges that Plaintiffs are not entitled to equitable relief insofar as they have adequate remedies  
 3 at law.

4 AS A TWENTY-FIFTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 5 Bank alleges that all or portions of Plaintiffs' claims are barred by the doctrines of waiver and  
 6 release.

7 AS A TWENTY-SIXTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 8 Bank alleges that Plaintiffs and putative plaintiffs or class members consented to, encouraged, or  
 9 voluntarily participated in all actions taken, if any.

10 AS A TWENTY-SEVENTH, SEPARATE, AND AFFIRMATIVE DEFENSE,  
 11 HSBC Bank alleges that any unlawful or other wrongful acts of any person(s) employed by  
 12 Defendants, or any of them, were outside of the scope of his or her authority and such acts, if any,  
 13 were not authorized, ratified, or condoned, nor did Defendants know or have reason to be aware of  
 14 such alleged conduct.

15 AS A TWENTY-EIGHTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 16 Bank alleges that Plaintiffs' claims are barred in whole or in part by the doctrine of accord and  
 17 satisfaction.

18 AS A TWENTY-NINTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 19 Bank alleges that Plaintiffs' claims for recovery pursuant to California Business and Professions  
 20 Code § 17200 *et seq.* are barred with respect to penalties of any nature.

21 AS A THIRTIETH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 22 alleges that, to the extent Plaintiffs seek statutory or other penalties, such claims must comport with  
 23 the due process requirements of *State Farm v. Campbell*, 538 U.S. 408 (2003).

24 AS A THIRTY-FIRST, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 25 Bank alleges that the Complaint and each cause of action therein, or some of them, is barred because  
 26 the applicable wage orders of the California Industrial Welfare Commission or the provisions of the  
 27 California Labor Code, New Jersey State Wage and Hour Law, and New York Labor Law are  
 28 unconstitutional vagueness and ambiguous and violate HSBC Bank's rights under the United States

1 Constitution, the California Constitution, the New Jersey Constitution and/or the New York  
 2 Constitution to, among other things, due process of law.

3 AS A THIRTY-SECOND, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 4 Bank alleges that Plaintiffs' prayers for restitution or injunctive relief under California Business and  
 5 Professions Code § 17200 *et seq.* are barred with respect to any alleged violations that have  
 6 discontinued, ceased, or are not likely to recur.

7 AS A THIRTY-THIRD, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 8 Bank alleges that Plaintiffs' claims are barred in whole or in part because Plaintiffs' alleged injuries  
 9 were not proximately caused by any unlawful policy, custom, practice and/or procedure promulgated  
 10 and/or tolerated by any Defendant.

11 AS A THIRTY-FOURTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 12 Bank alleges that the Complaint fails to properly state a claim for interest, as the damages claimed  
 13 are not sufficiently certain to support an award of interest.

14 AS A THIRTY-FIFTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 15 Bank alleges that the Complaint fails to properly state a claim for recovery of costs and attorneys'  
 16 fees under California Labor Code §§ 218.5 or 1194, California Code of Civil Procedure § 1021.5,  
 17 California Business and Professions Code § 17200 *et seq.*, New Jersey State Wage and Hour Law,  
 18 New York Labor Law, and/or 29 U.S.C. § 216(b), or any other basis.

19 AS A THIRTY-SIXTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 20 Bank alleges that the Complaint fails to properly state a claim for recovery of compensatory  
 21 damages based upon wages due and owing, restitution, or any other basis.

22 AS A THIRTY-SEVENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 23 Bank alleges that further investigation and discovery will reveal that defendants are entitled to an  
 24 offset against any relief due Plaintiffs, and/or those persons they seek to represent, based upon their  
 25 respective wrongful conduct and/or monies owed.

26 AS A THIRTY-EIGHTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 27 Bank alleges that the Complaint fails to properly state a claim that may be maintained as a class  
 28

1 action under Rule 23 of the Federal Rules of Civil Procedure or any corresponding state law  
 2 requirements regarding class actions.

3 AS A THIRTY-NINTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 4 Bank alleges that Plaintiffs or some of them cannot fairly and adequately represent the interests of  
 5 the purported class.

6 AS A FORTIETH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 7 alleges that all Plaintiffs or some of them are not proper parties to the action.

8 AS A FORTY-FIRST, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 9 alleges that certification of a class, as applied to the facts and circumstances of this case, would  
 10 constitute a denial of its rights to trial by jury and to substantive and procedural due process, in  
 11 violation of the Fourteenth Amendment of the United States Constitution and the Due Process and  
 12 Equal Protection Clauses of the California, New Jersey and/or New York Constitutions.

13 AS A FORTY-SECOND, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 14 Bank alleges that this suit may not be properly maintained as a class action because: (a) Plaintiffs  
 15 have failed to plead and/or cannot establish the necessary procedural elements for, class treatment;  
 16 (b) a class action is not an appropriate method for the fair and efficient adjudication of the claims  
 17 described in the Complaint; (c) common issues of fact or law do not predominate; to the contrary,  
 18 individual issues predominate; (d) Plaintiffs' claims are not representative or typical of the claims of  
 19 the putative class; (e) Plaintiffs are not proper class representatives; (f) the named Plaintiffs and  
 20 alleged putative class counsel are not adequate representatives for the alleged putative class;  
 21 (g) Plaintiffs cannot satisfy any of the requirements for class action treatment, and class action  
 22 treatment is neither appropriate nor constitutional; (h) there is not a well-defined community of  
 23 interest in the questions of law or fact affecting Plaintiffs and the members of the alleged putative  
 24 class; (i) the alleged putative class is not ascertainable, nor are its members identifiable; and (j) to the  
 25 extent the alleged putative class is ascertainable and its members are identifiable, the number of  
 26 putative class members is too small to meet the numerosity requirement for a class action.

27 AS A FORTY-THIRD, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 28 alleges that this suit may not be properly maintained as a collective action because: (a) Plaintiffs

1 have failed to plead and/or cannot establish the necessary procedural elements for collective action  
 2 treatment; (b) a collective action is not an appropriate method for the fair and efficient adjudication  
 3 of the claims described in the Complaint; (c) common issues of fact or law do not predominate; to  
 4 the contrary, individual issues predominate; (d) Plaintiffs' claims are not representative or typical of  
 5 the claims of the putative class; (e) Plaintiffs are not proper class representatives; (f) the named  
 6 Plaintiffs and alleged putative class counsel are not adequate representatives for the alleged putative  
 7 class; (g) Plaintiffs cannot satisfy any of the requirements for collective action treatment, and  
 8 collective action treatment is neither appropriate nor constitutional; (h) there is not a well-defined  
 9 community of interest in the questions of law or fact affecting Plaintiffs and the members of the  
 10 alleged putative class; (i) the alleged putative class is not ascertainable, nor are its members  
 11 identifiable; and (j) to the extent the alleged putative class is ascertainable and its members are  
 12 identifiable, the number of putative class members is too small to meet the numerosity requirement  
 13 for a collective action.

14 AS A FORTY-FOURTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 15 Bank alleges that the adjudication of the claims of the putative class through generalized class-wide  
 16 proof would violate its rights to trial by jury under the United States Constitution and/or the  
 17 California Constitution and/or the New York Constitution and/or the New Jersey Constitution.

18 AS A FORTY-FIFTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 19 alleges that the Complaint fails to properly state facts sufficient to entitle Plaintiffs or putative class  
 20 members to any relief, including, but not limited to, its failure to properly state facts sufficient to  
 21 identify any actual or threatened harm to Plaintiffs beyond pure speculation, its failure to allege facts  
 22 showing that Plaintiffs have no adequate remedy at law, and that the proposed relief would impose  
 23 an undue burden on both HSBC Bank and the Court and be so uncertain as to be wholly  
 24 unenforceable.

25 AS A FORTY-SIXTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 26 opposes class certification and disputes the propriety of class treatment. If the Court certifies a class  
 27 in this case over HSBC Bank's objections, then HSBC Bank asserts the affirmative defenses set  
 28 forth herein against each and every member of the certified class.

1                   AS A FORTY-SEVENTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 2 Bank alleges that Plaintiffs' claim for relief under New York law may not proceed as a class action  
 3 by operation of New York Civil Practice Law and Rules § 901(b).

4                   AS A FORTY-EIGHTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 5 Bank alleges that Plaintiffs' Ninth, Tenth and Eleventh Claims fail because no deductions were  
 6 taken from "wages" already earned by any employee.,.

7                   AS A FORTY-NINTH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 8 Bank alleges that Plaintiffs' Ninth, Tenth and Eleventh Claims fail because, assuming *arguendo* that  
 9 any deductions were taken from employees' wages, all deductions were authorized by the employee  
 10 in writing and did not reduce the agreed-upon wage.

11                  AS A FIFTIETH, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 12 alleges that Plaintiffs' Ninth, Tenth and Eleventh Claims fail because, assuming *arguendo* that any  
 13 deductions were taken from employees' wages for any business loss, such loss was caused by a  
 14 dishonest, willful or grossly negligent act of the employee.

15                  AS A FIFTY-FIRST, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 16 alleges that Plaintiffs' Ninth, Tenth and Eleventh Claims fail because any reductions in commissions  
 17 occurred as a result of the employee not meeting contractual conditions precedent for earning  
 18 commissions.

19                  AS A FIFTY-SECOND, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC  
 20 Bank alleges that all or some of Plaintiffs' claims are barred for failure to exhaust the requisite  
 21 administrative remedies.

22                  AS A FIFTY-THIRD, SEPARATE, AND AFFIRMATIVE DEFENSE, HSBC Bank  
 23 alleges that Plaintiffs were not entitled to payment of overtime premiums because HSBC Bank at all  
 24 times believed and acted in good faith that the employees were exempt from overtime requirements  
 25 pursuant to, but not limited to, 29 U.S.C. § 213 *et seq.* (excluding the executive, professional,  
 26 administrative and retail exemptions as specified in the Court's March 19, 2008 Order Granting In  
 27 Part and Denying In Part Plaintiffs' Motion for Conditional Certification, For Production, and For  
 28 Partial Summary Judgment; Directions to Parties; Vacating Hearing), the California Labor Code, the

1 California Industrial Welfare Commission's wage orders, New Jersey State Wage and Hour Law and  
 2 New Jersey written administrative regulations, orders, rulings or approvals and interpretations, and  
 3 New York Labor Law.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, HSBC Bank prays for judgment from this Court as follows:

6 1. Plaintiffs take nothing by this action;

7 2. That the Complaint be dismissed with prejudice and that judgment be entered  
 8 against Plaintiffs and in favor of HSBC Bank on each of Plaintiffs' causes of action;

9 3. That Plaintiffs be ordered to pay HSBC Bank's costs and attorneys' fees,  
 10 including, but not limited to, costs and attorneys' fees provided under California, New Jersey and/or  
 11 New York law; and

12 4. Such other and further relief as the Court deems appropriate and proper.

13 Dated: September 11, 2008

14  
 15 */s/ Michelle R. Barrett* \_\_\_\_\_  
 16 MICHELLE R. BARRETT  
 17 LITTLER MENDELSON  
 18 A Professional Corporation  
 Attorneys for Defendants  
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 and HSBC BANK USA, N.A.

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